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No. 52

In The Supreme Court of the United States

OCTOBER TERM, 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO., a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF AMICUS CURIAE

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SUBJECT INDEX

	Page
Interest of Amicus Curiae	1
Argument	2
Conclusion	6

TABLE OF CASES

Davis v. Dept. of Labor, 317 U.S. 249, 63 S. Ct. 225, 87 L. ed. 246	2

STATUTES

ORS 656.044	1

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State Industrial Accident Commission of Oregon is the only entity authorized by law to provide workmen's compensation insurance, as such, in Oregon. By virtue of ORS 656.044, this state agency is also authorized to insure employers against their liability for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Though Oregon's workmen's compensation is "elective", respondent is among the small percentage of Oregon's affected employers exercising the election not to be subject to the law.

The interest of amicus curiae in this litigation is the adverse effect upon the construction and administration of Oregon workmen's compensation law and safety law if the decision of the Oregon Supreme Court is not reversed.

ARGUMENT

Workmen employed in areas of questionable jurisdiction should enjoy a twilight zone election of remedies regardless of the form of remedy.

The case and statute law are amply covered in the decision subjected to certiorari and the briefs pertaining to the application for the writ.

The demand for governmental services has developed a vast field of quasi-judicial administrative agencies. If there is one prime bane of bureaucracy it is the passion for pigeon holes. Everything must be black or white. The tops of countless desks remain forever cluttered while the administrator labors to decide whether the gray matter is black or white.

Is it repugnant to democratic processes to recognize a gray zone? The administrator is not bulwarked by the time, the briefs and the counsel to outguess the final review of every close question. *Davis v. Dept of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L. ed. 246 stands as a

landmark. It added flexibility to the administration of the law.

The respondent-employer and Oregon Supreme Court were concerned with lack of precedent for the particular choice of remedies in the case at issue.

From page 4, respondent's brief in opposition to petition for the writ, we note:

> "However, the long acceptance of the workmen's compensation principle, the force of organized labor, and the economics of the matter, have resulted in all Oregon employers of hazardous occupations carrying either state, private or self-insured coverage for workmen's compensation benefits. The petitioner was not an 'uncovered' employee, nor are others in hazardous occupations 'uncovered' employees in Oregon."

Respondent's insurance policies are a closely guarded secret, but if we accept this proposition, there is ample precedent in the Longshoremen's and Harbor Workers' Act and the *Davis* decision. Failure to secure benefits under the Longshoremen's Act subjects the employer to action for damages. Failure to secure the benefits provided by Oregon Workmen's Compensation Law subjects the employer to action for damages. The purpose of both laws is to penalize the employer for failure to secure a certainty of compensation. Respondent-employer complains that the uncertainty will upset the uniform administration of maritime law. Any uncertainty

is of respondent's choice. Having elected to expose itself to uncertainty, it should not be heard to claim this as a defense.

Respondent at page 8, brief in opposition to petition for the writ, states:

> "This action was brought under a statute known as the Oregon Employers' Liability Act, Oregon Revised Statute 654.305, et seq. This law places a substantially higher standard of responsibility on the employer."

Respondent would turn backward the clock in labor's struggle for a safe place to work. The higher standard of responsibility included a secure ladder, not one nailed to rotten wood. Did congress intend to destroy rights in enactment of the Longshoremen's and Harbor Workers' Act? Did congress intend to impair safety regulations in areas of local concern? May every sand and gravel operation of purely local concern violate state safety laws with impunity? The answers are negative.

It is submitted that not every body of water navigable in fact is navigable water of the United States. Among these waters are those created by private interests. The entire area of the accident was included within the United States Patent as the foundation of respondent's interest. The Patent refers to meander lines. We must assume that in 1873 there was no lagoon and no navigable

water. Otherwise we collaterally impeach the official United States survey, its meander lines and the United States Patent. If the respondent had created a lake on this island would the seeping waters of the Willamette River return jurisdiction to the United States? We think not. When the United States, by official Patent, deeds away an area with all appurtenances does a lagoon from a private lake to navigable waters destroy State jurisdiction over local matters in that lake? We think not. The area where respondent is now dredging was 20 feet above high water, with oak trees 4 feet in diameter (p. 77 Tr. of Record).

The public policy of the State of Oregon is also involved. The State imposes sanctions on employers failing to secure state compensation. The State, with its state fund insurance, remains liable for twilight zone injuries. The interpretation sought by respondent-employer frees respondent and its insurer from liability which would still attach to the state for its insured employers. The sanctions are destroyed and public policy reversed to the detriment of the class sought to be protected.

CONCLUSION

At a time when the Federal Government and this Court are being belabored for allegedly usurping functions of the States it seems apropos to suggest the States be reassured. The States should retain jurisdiction of local matters and those arising from twilight zones. The respondent-employer failed to secure state compensation, violated state safety regulations and now argues jurisdiction solely for measure of damages. The respondent elected not to be protected from action for his wrongs and should not now be allowed to invoke a purely maritime statute for compensation of labor to defeat State statutes for both protection and compensation of labor in areas of State concern.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF OF RESPONDENT

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INDEX

Page

Question Presented ... 1

Summary of the Argument ... 1

Argument:

1. The injury occurred upon navigable waters of the United States ... 2
2. An affirmance will not affect the humanitarian principle of workmen's compensation ... 3
3. The "twilight zone" cannot be expanded to include cases of this type ... 7
4. The facts of this accident do not place it within the "twilight zone" ... 16
5. The "twilight zone" does not apply to a choice between the damage action and the federal compensation proceedings, but only to a choice between federal and state compensation proceedings ... 22
6. Petitioner's action is based upon the Oregon Employers' Liability Act and this Act cannot be Constitutionally applied to a maritime tort ... 27

Conclusion ... 29

Appendix A ... 31

Appendix B ... 34

Appendix C ... 48

CITATIONS (Cont.)

Page

U. S. Constitution and Statutes

Article I, Sec. 8 (U. S. Constitution) 9

Article III, Sec. 2 (U. S. Constitution) 8

33 USCA 901-950 1, 7

33 USCA 902(4) 17

33 USCA 913(a)(d) 26

Oregon Statutes

ORS 654.305 27

ORS 654.330 28

ORS 654.335 28

ORS 656.024 4

ORS 656.154 15

ORS 656.326(2) 6

Texts

Chairman's Report of the Interim Committee on the Study of the Workmen's Compensation Law in Oregon, 1940 6

68 Congressional Record, p. 5412 22

Forty-ninth Annual Report of the Insurance Commissioner of the State of Oregon, 1956 7

Gilmore and Black, The Law of Admiralty 24

Samuel B. Horowitz, Injury and Death under Workmen's Compensation Laws 24

Robinson on Admiralty 7

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BRIEF OF RESPONDENT

QUESTION PRESENTED

The question presented is whether or not the petitioner is barred from maintaining a damage action on the grounds that the sole and exclusive liability of the respondent to the petitioner employees is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act (USCA Secs. 901-950).

SUMMARY OF THE ARGUMENT

The petitioner's sole remedy is that remedy provided for under the Longshoremen & Harbor Workers' Com-